# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 26, 2004 |
| v | No. 249429<br>Alcona Circuit Court |
| DARYL DOUGLAS JUSTICE,<br><br>Defendant-Appellant. | LC No. 02-011054-FC |

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to twenty to forty years' imprisonment for his CSC I conviction and eight to fifteen years' imprisonment for his CSC II conviction. We affirm defendant's convictions but remand to the trial court for resentencing or rearticulation of its reasons for departure from the sentencing guidelines.

I

Defendant argues that evidence of prior bad acts was improperly admitted under MRE 404(b). He asserts that the bad acts evidence was only offered to show his propensity to commit the charged acts and for no proper purpose, that the evidence was not relevant to any material issue, and that the probative value of the evidence was greatly outweighed by the danger of unfair prejudice. We disagree.

"The decision whether . . . [MRE 404(b)] evidence will be admitted is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Furthermore, "[i]f an error is found, defendant has the burden of establishing that, more probably than not, a miscarriage of justice has occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

A twenty-five-year-old witness testified that when she was a child her father and stepmother worked for defendant at his plumbing company, and that when she was ten or eleven years old, defendant would touch her breasts and vagina when they were alone. She stated that one time when the witness went up north with defendant and his family, defendant came into her bedroom and tried to put his penis into her mouth. The younger sister of the eight-year-old victim in this case testified that she and her siblings sometimes went to work with their mother at defendant's plumbing shop and would play hide and seek with defendant. She claimed that sometimes she and defendant would hide in the bathroom and defendant would put his hand in her pants. It is this testimony that defendant challenges.

The facts of this case and the bad acts testimony are not distinguishable from those in *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). In *Sabin (After Remand)*, the trial court admitted evidence of prior sexual abuse of defendant's step-daughter, which had occurred nine to fifteen years before the charged act. *Id.* at 49. The 404(b) evidence was offered on a theory that the prior abuse demonstrated the defendant's "scheme, plan, or system in doing an act, to show defendant's motive and intent, to show an absence of mistake and to bolster complainant's credibility." *Id.* at 59. Citing *Crawford*, *supra*, this Court reversed the lower court, finding that the charged and uncharged acts were "substantially dissimilar." *People v Sabin (On Remand)*, 236 Mich App 1, 9; 600 NW2d 98 (1999). Our Supreme Court reversed and reinstated the conviction.

The prosecution argued that these circumstances showed that defendant had a "common scheme, system, or plan" to befriend his employees and then take sexual advantage of their children. Because defendant claimed that the abuse allegations were fabricated, the evidence provided by the prior victims was admissible to show that the charged acts in fact occurred. This is a proper purpose for its admission. *Id.* at 63. Further, although there were some dissimilarities, the uncharged and charged acts were sufficiently similar to make the testimony relevant. *Id.* at 67. Specifically: (1) the victims were children of employees, like defendant's prior victims; (2) in the case of one of the charged and both uncharged victims, defendant had established a close friendship with their fathers; (3) the victims were similar ages when the alleged abuses occurred; (4) three of the victims were abused on at least one occasion on trips to defendant's vacation home in Alcona County; and, (5) the type of alleged sexual abuse was substantially similar in all cases. We also do not find that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not err in admitting this testimony. *People v VanderVliet*, 444 Mich 52, 84; 508 NW2d 114 (1993) ("When relevance to an issue other than mere propensity is found, Rule 404(b) is not violated.").

II

Defendant next argues that this Court should change the standard of review for the admission of MRE 404(b) evidence to the three-part standard of review used by the federal Sixth Circuit Court of Appeals. The most significant difference between the standard of review used by this Court and that used by the Sixth Circuit is that Michigan uses an abuse of discretion standard for all prongs of the 404(b) test for admissibility, including whether the evidence is offered for a proper purpose. In contrast, the Sixth Circuit reviews de novo "the legal determination . . . whether the 'other act' allegedly committed by the defendant was admissible

as evidence of 'intent, preparation, or plan.'" *United States v Gessa*, 971 F2d 1257, 1261-1262 (CA 6, 1992).

We find that the 404(b) evidence offered by the prosecution was properly admitted under Michigan's abuse of discretion standard and are not persuaded that, given the close similarity between the charged and uncharged acts, the evidence would be inadmissible under the Sixth Circuit's less deferential standard of review.

III

Defendant also argues that he was deprived of a substantial defense when he was prevented from offering evidence of bias of a witness. We disagree. "Proof of bias is almost always relevant, because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony." *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). However, "the trial court has wide discretion in determining how far afield the inquiry should go." *People v Perkins*, 116 Mich App 624, 628; 323 NW2d 311 (1982), citing McCormick, Evidence (2d ed), § 41, p 81. We review a trial court's decision on admission of evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant claims that the court refused to admit evidence that would tend to show that the father of one of the victims had a motive to help his daughter and niece fabricate a story about defendant's sexual abuse. The inference (i.e., that the witness had taken money and equipment from defendant's business and therefore had a motive to have his stepdaughter and niece fabricate sexual abuse claims) that defendant was trying to establish by the evidence was tenuous at best. The witness testified that he worked with defendant and had stored some of defendant's equipment, which was later returned to defendant's son. Defendant did not rebut this testimony. Moreover, defendant's own testimony tends to show that defendant's business was defunct at the time the charged acts occurred and that the witness had little, if any, opportunity to steal checks owed to defendant's son. Moreover, much of the evidence that defendant argues was excluded was, in fact, admitted. Thus, it cannot be argued that the trial court's limitation of the introduction of bias evidence was an abuse of discretion or somehow deprived defendant of a fair trial. *Perkins, supra,* 116 Mich App at 629.

IV

Defendant also argues that he was denied effective assistance of counsel by defense counsel's failure to request a curative instruction after a witness mentioned that defendant offered to take a polygraph test, failure to argue inconsistencies in the testimony of two witnesses, and failure to call and question the physician who examined the complainants after the sexual abuse took place. Again, we disagree.

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective

assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted).

"Normally, reference to a polygraph is not admissible before a jury. Indeed it is a bright line rule that reference to taking or passing a polygraph test is error." *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000) (citations omitted). However, while inadmissible, reference to a polygraph may not rise to the level of error requiring reversal. We look at a number of factors in determining whether the introduction of polygraph evidence warrants reversal, including whether the reference was inadvertent, whether there were repeated references, whether the results of the polygraph test were actually admitted rather than simply evidence that a test was taken, and whether there was a curative instruction given. *Id.* at 98.

Defense counsel did not have grounds to move for a mistrial when there was only one brief, inadvertent reference to a possible polygraph examination of defendant. Counsel could have asked for a curative instruction; however, his failure to do so was arguably a matter of trial strategy. It seems likely that defense counsel did not want to emphasize that defendant may have taken a polygraph, leading the jury to speculate as to the results. "It is well established that this Court will not second-guess trial counsel in matters of trial strategy." *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Likewise, defense counsel's decision not to argue inconsistencies in the testimonies of two witnesses, and his decision not to call the complainants' examining physician were also matters of trial strategy that we will not second-guess on appeal. *Id.* Defendant was not denied a substantial defense. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Moreover, it is well established that "the fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

V

Finally, defendant argues that the court did not articulate substantial and compelling reasons for its departure from the sentencing guidelines. We agree.

> [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed . . . for clear error. The determination that a particular factor is objective and verifiable should be reviewed . . . as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. [*People v Fields*, 448 Mich 58, 72-78; 528 NW2d 176 (1995). See also *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).]

The trial court gave five reasons for its upward departure from the sentencing guidelines First, the court noted that defendant has prior CSC convictions involving children. However, this was accounted for in the sentencing information report and the court made no finding that this was inadequately accounted for in the scoring.

Second, the court stated that defendant may "have been habitualized based on his prior convictions." The prosecutor was not initially aware of defendant's prior CSC convictions, but did learn of them before trial. Nevertheless, the prosecutor did not give notice to defendant of his intention to rely on the prior convictions for sentence enhancement as required by MCL 769.13. *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997). The only exception to the timely notice requirement is where the prosecutor must verify out-of-state convictions. *People v Fountain*, 407 Mich 96, 99; 282 NW2d 168 (1979). The court's attempt to enhance defendant's sentence because of his prior CSC convictions violates the notice requirements of MCL 769.13, and cannot be used as a "substantial and compelling" reason for departure from the guidelines.

Third, the court noted that defendant had a history of manipulating people for the purpose of preying on their children. However, the court failed to articulate its reasoning for considering these circumstances.

Lastly, the court noted that defendant tried to manipulate the jury by testifying in a narrative fashion and that defendant attempted to blame the victims at his sentencing. These reasons for departure from the guidelines are not objective or verifiable. Therefore, they may not be used to justify a departure from the guidelines.

Because the court failed to articulate a substantial and compelling reason for its departure from the guidelines, we remand for resentencing in accordance with the guidelines, or rearticulation of the court's reasons for the departure. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey